BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KRISTI HOUSEL	)	
Claimant	)	
	)	
VS.	)	
	)	
VALLIS BUSINESS FORMS CO., INC.	)	
Respondent	)	Docket No. 262,116
	)	
AND	)	
	)	
SAFECO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Jon L. Frobish's Award dated December 12, 2001. The Board heard oral argument on June 18, 2002, by telephone.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Thiesing of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for a series of accidents which caused bilateral carpal tunnel injuries. Judge Frobish awarded the claimant a 68.5 percent work disability based on a 37 percent task loss and a 100 percent wage loss.

Respondent argues claimant failed to make a good faith job search and is capable of earning a comparable wage. Accordingly, respondent concludes claimant should be limited to her functional impairment.

Conversely, claimant argues the Administrative Law Judge's decision should be affirmed in all respects.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant, Kristi Housel, completed the ninth grade and later received her GED in February 1997. She attended junior college but did not complete any class work or receive any college credits. The claimant does not have any additional specialized vocational training.

Claimant began working for the respondent in March or April 1999. Claimant's job duties as a jogger included picking up stacks of paper at the end of a conveyor belt and putting the paper on a machine to jog the papers in place. She then would take the paper out of the jogger and put it in a box or on a skid to be sent to shipping. Claimant was required to use a forceful grasp of her fingers and wrist flexion. Claimant would perform these activities for a complete work shift of 12 hours.

Claimant began developing problems with her upper extremities. Claimant initially sought treatment with her personal physician but was later referred to David K. Wong, M.D., a board certified orthopedic surgeon in Tulsa, Oklahoma. Dr. Wong provided treatment and ultimately performed a carpal tunnel release on claimant's right wrist on June 5, 2000. Dr. Wong performed the same surgery on the left wrist on July 17, 2000.

Claimant's post surgery treatment consisted of supervised therapy for range of motion and strengthening due to swelling in her hands after surgery. Claimant was placed on some oral steroids for a week as well as some nonsteroid anti-inflammatory medications.

On September 18, 2000, Dr. Wong determined the claimant had reached maximum medical improvement and rated the claimant with a 6 percent permanent partial impairment to each hand. Combining the 6 percent to each hand converts to 10 percent to the body as a whole. Dr. Wong placed the following permanent restrictions on the claimant: (1) restricted from using vibratory tools and highly repetitive activities such as quota work or assembly line work; and, (2) no lifting over 10 pounds.

When claimant returned to work for respondent, she was provided a job where she had to take a pair of tweezers and poke out holes in business forms. Claimant could punch out from 1-10 holes per form. Claimant only worked for three hours when her hands started hurting again. Claimant was advised by her supervisor to go home and contact her doctor. The supervisor did not have anything else the claimant could do. Claimant contacted Dr. Wong's office and was told not to go back to work if her hands were bothering her. Claimant has not been contacted by the respondent since that time.

Claimant worked for Cherry Hill Express earning $5.50 an hour in January 2001. The claimant was required to grip bottles, pop, juices, 12-packs and the broom. She had to quit because her hands were starting to hurt. She only worked for about two months.

Claimant has looked for work in the Cherryvale, Independence, and Coffeyville, Kansas areas and in Bartlesville, Oklahoma. She testified that once or twice a week, she has looked for work. Claimant testified she would talk with the prospective employer, show them her doctor's report and see if she could fill out an application. She checked clothing stores, Hibbit Sports, J.C. Penney's, Stage and a position selling cell phones in the Bartlesville mall. She further testified she looked for work at convenience stores, as a bank teller and sales person.

The respondent and its insurance carrier hired a vocational placement service to help the claimant find a job. Even with the assistance of the vocational placement service, claimant was unable to find a job. Claimant testified she participated in the job placement by going on all the interviews.

The respondent and its insurance carrier hired Re-Employment Services to assist claimant in her job search. Gordon R. Butler, one of the limited partners of Re-Employment Services and a certified vocational rehabilitation counselor and job placement specialist in Kansas, testified regarding the effort to find claimant leads for potential employment.

Re-Employment Services rents office space at the location of their answering service in Overland Park, Kansas. All of the contacts with claimant and the prospective employers were conducted by staff located in either St. Louis, Missouri or Orlando, Florida. Mr. Butler testified from records compiled by his staff but had never talked to claimant.

A case strategy form indicated Re-Employment Services was to provide information to the respondent’s defense attorney to assist in a settlement offer. Mr. Butler testified that Re-Employment was only requested to find six leads.

Mr. Butler testified claimant was provided seven prospective jobs but one was filled before claimant’s scheduled interview. He further testified claimant only showed up for one of the remaining interviews. However, on cross-examination it was pointed out claimant was not notified of the interview date until four days after the interview was scheduled for one of the job leads. Two of the job leads required work in excess of claimant’s restrictions

and another was only part-time. Claimant did attend the one interview that was scheduled but was not hired.

Karen Terrill, a vocational expert, testified regarding the claimant's 15-year work history broken down into job tasks. Ms. Terrill opined the claimant would be able to earn $5.50 to $6.50 an hour. Ms. Terrill further opined the claimant made a good faith effort to return to work. Ms. Terrill opined the claimant's good faith effort included seeking employment actively by putting in applications or contacting individuals within reasonable vocational areas. Ms. Terrill testified there is nothing preventing the claimant from working full-time except finding a full-time job.

Claimant was referred for examination by Edward J. Prostic, M.D., at the request of her attorney. Dr. Prostic first saw the claimant on October 23, 2000. Dr. Prostic performed a physical examination of the claimant and diagnosed the claimant with bilateral carpal tunnel syndrome and stenosing tenosynovitis. Dr. Prostic's restrictions for the claimant are the same as Dr. Wong's. Based upon the AMA Guides, Fourth Edition, Dr. Prostic opined the claimant has a 14 percent permanent partial impairment of the body as a whole. Dr. Prostic opined the claimant is not able to perform 19 out of the 52 tasks identified by Ms. Terrill. This computes to a 37 percent task loss.

CONCLUSIONS OF LAW

It is undisputed claimant suffered bilateral carpal tunnel syndrome as a result of her repetitive work activities. The parties stipulated to a date of accident of January 22, 2000. The issue raised on review by respondent is the nature and extent of disability, specifically whether claimant is entitled to a work disability or is limited to her functional impairment.

The treating physician, Dr. Wong, rated claimant with a 6 percent permanent partial impairment to each hand which converted to 10 percent to the body as a whole. Dr. Prostic rated claimant at 14 percent to the body as a whole. The Administrative Law Judge's Award does not contain a finding regarding the percentage of functional impairment. The Board finds the doctors' opinions should be accorded equal weight and accordingly determines claimant has suffered a 12 percent permanent partial impairment to the body as a whole.

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference

> between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . .[3]

Although respondent attempts to portray claimant as not cooperating with the respondent's efforts to find job leads, the Board agrees with the Administrative Law Judge's determination that the claimant's effort was adequate. The claimant was provided job leads that were outside her restrictions and for part-time employment. There was also the failure to timely notify claimant of the interview date for one job. It is disingenuous for respondent to argue claimant only showed up for one interview when the provided leads were late and included part-time jobs as well as jobs which were outside claimant's medical restrictions.

Respondent further argues Karen Terrill indicated 5 to 10 contacts a week would comprise a good faith job search and because claimant was not making that many contacts she was not making a good faith job search. Ms. Terrill testified that if her firm was working with claimant that would be an appropriate number of leads and interviews

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] Copeland, at 320.

per week. But she further noted that the limited job market in claimant's area would mean if she put in 5 to 10 contacts a week she would be repeatedly going to the same employers. The claimant testified she applied for one or two jobs a week. Karen Terrill indicated claimant was seeking the appropriate types of employment based upon her education, work history, medical restrictions and the availability of employment in the area where claimant lived. The Board agrees and adopts the Administrative Law Judge's decision that claimant has made a good faith effort to find employment. Because she has been unable to locate employment, claimant is entitled to a 100 percent wage loss.

Dr. Prostic provided the only testimony regarding task loss. The doctor opined claimant could no longer perform 19 of the 52 tasks identified by Ms. Terrill. This results in a 37 percent task loss. The claimant has met her burden of proof to establish she has suffered a 68.5 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 12, 2001, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June 2002.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Matthew J. Thiesing, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director